

DOCKET FILE COPY ORIGINAL

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0606

FAX (703) 841-2345

POST OFFICE BOX 19006

WASHINGTON, D.C. 20036-9006

TELEPHONE

(202) 331-0606

RECEIVED

DEC 5 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RICHARD M. RIEHL

December 5, 1994

Our File No.
1162-101-71

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

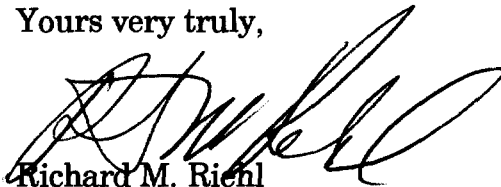
RE: MM Docket No. 93-158
Hazlehurst, Utica, and Vicksburg, Mississippi

Dear Mr. Caton:

On behalf of Donald Brady please find enclosed an original and four copies of his Petition for Reconsideration in the above referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,



Richard M. Riehl

Enclosures

RMR/das

No. of Copies rec'd
List A B C D E

004

RECEIVED

Before The

Federal Communications Commission

DEC 5 1994

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations,)MM Docket No. 93-158
RM No. 8239Hazlehurst, Utica and
Vicksburg, Mississippi)

TO: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Donald Brady ("Brady"), a Party expressing interest in the allocation of FM Channel 265C3 at Utica, Mississippi, by his attorneys and pursuant to Section 405 of the Communications Act and Section 1.106 of the Rules, hereby requests the Chief, Mass Media Bureau, to reconsider the Report and Order in the above-captioned matter (DA-94-1201) Released November 3, 1994 (R&O). Reconsideration of the R&O is sought on the ground that the action substituting FM Channel 265C3 for Channel 225A at Utica, Mississippi and making other changes in the FM Table of Allotments (47 CFR §73.202 (b)) is premised on three fundamental errors of law flowing from the Chief's refusal to consider supplemental pleadings properly before him¹, namely: (1) The Notice of Proposed Rule Making ("NPRM")² in this proceeding is a Final Order that had become Final and could not be modified; (2) by failing to consider the

¹ See R&O, para. 1, Note 5.

² 8 FCC Rcd 4080, released June 16, 1993.

reasons Mr. Brady's Comments were not received in the Secretary's office until the day after the Comment period ended; and (3) that Brady's expression of interest was not untimely. These errors resulted in the misapplication of established law and precedent. In support of reconsideration of the R&O, the following is respectfully submitted.

BACKGROUND

1. The Notice of Proposed Rule Making and Order to Show Cause ("NPRM"), 8 FCC Rcd 4080, in this proceeding, released on June 16, 1993, established a Comment Date of August 9, 1993. The NPRM held, in effect, that this proceeding did not involve an "incompatible channel swap" (*See NPRM para. 3*).³ In accordance with the NPRM, Mr. Brady timely filed an expression of interest in the proposed Utica allocation.⁴ Rather than submit a showing establishing that another comparable channel is available at Utica as required by § 1.420(g) of the Rules and the NPRM, Proponent St. Pe in its reply comments argued that the NPRM was in error and that this proceeding involved an "incompatible channel swap" and hence no other expressions of interest could be considered.

2. Brady, in response to the new matter raised in Reply Comments filed Supplemental Comments bringing to the Chief's attention the fact that the NPRM was a Final Order that had become

³ Paragraph 3 provides in pertinent part: "... However, in accordance with § 1.420(g) of the Commission's Rules, should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent class channel is also allotted."

⁴ In accordance with § 1.52 of the Rules, a facsimile of Mr. Brady's expression of interest was received by the Commission at 1:45 PM on August 9, 1993, the due date.

Final before the Proponent alleged the existence of error in the NPRM and hence the NPRM could not be modified. Earlier, in a Contingent Motion for Leave, Mr. Brady provided information establishing, in the event it was concluded that the electronic transmission of his expression of interest on the due date was nevertheless not timely, that acceptance of his expression of interest should be accepted nunc pro tunc on the due date.

3. Rather than address these critical issues, the R&O improperly and erroneously hid behind Rule 1.405 which, with material exceptions, bars consideration of additional pleadings. It is for this reason that reconsideration and reversal of the R&O is hereby requested.⁵

DISCUSSION

The NPRM Is A Final Order And Cannot Be Modified.

2. The R&O at paragraph 1, Note 4, in part, states:

"The Notice incorrectly indicated that comments expressing an interest in the use of Channel 265C3 at Utica would be accepted. . . ." (Emphasis added.)

and thereafter proceeded as if NPRM paragraph 3 did not exist. The R&O therefore effectively modified this fundamental paragraph in the NPRM

⁵ There are believed to be other errors in the R&O such as the novel interpretation of "incompatible channel swaps," but these are more properly addressed in an Application for Review, should that become necessary.

that not only permitted expressions of interest in the proposed Channel 265C3 allocation at Utica, but also made clear that:

3... should another party indicate an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent Class channel is also allotted.

FCC Rcd. at 4080.

3. This modification of the NPRM was apparently made in response to the arguments posed by Proponents in Reply Comments filed long after the period for reconsideration had expired and which the R&O claimed not to have considered. Nevertheless, whether as a result of Proponents' pleadings or by independent discovery, the ability of the staff to reconsider and modify Final Orders, such as NPRMs, in either circumstance is strictly constrained by Section 405 of the Act and Section 1.113 of the Rules. Each of these provisions requires such action to be taken within 30 days of the release of the Final Order and there can be no question that this NPRM is a Final Order⁶.

4. An NPRM in an FM allocations proceeding does two things. First it gives notice that it intends to amend Section 73.202(b) of the Rules. Second, the NPRM establishes the ground rules under which the proceeding is conducted. An NPRM thus has two facets, the second of

⁶ "[F]inal orders are not limited to the last order issued in a proceeding, but to be final an order must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'" *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)); see also *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975).

which fixes rights and imposes legal obligations on all persons wishing to participate.

5. Clearly, the cut-off dates fix participation rights of all interested parties. Similarly, paragraph 3 of the NPRM gave Proponents clear and precise notice of what was required if an expression of interest is filed and the effect – dismissal of the proceeding – if Proponents failed to comply. Proponents neither timely sought reconsideration of the NPRM nor made any effort to satisfy the mandate imposed by the NPRM.

6. The Chief was therefore without jurisdiction to reconsider and modify those portions of the NPRM here under consideration. His authority is controlled by *Hughes Moore & Associates*, 7 FCC Rcd 1454, 1455 (1992) (Once an Order is final any attempt to modify it is void ab initio). *Accord, Reuters Ltd. v. FCC*, 781 F2d 946, 59 RR2d 1063 (D.C. Cir. 1986). (Once an Order, issued in accordance with the Commission's Rules, becomes final the agency may not set it aside). Since there was an expression of interest by Mr. Brady and Proponents failed to provide an additional C3 Channel at Utica, this proceeding must be terminated.

**A Request to Accept Brady's Late
Filed Comments Was Ignored.**

7. Note 4 of the R&O also holds that Mr. Brady's Comments were not acceptable because they were late arriving at the Secretary's Office and were "not accompanied by a Motion to Accept." Because Mr. Brady believed his Comments were in fact timely filed, it was not until later, as a matter of caution, that he submitted his Contingent Motion for Leave on October 16, 1993.

8. That Motion advised the Commission that Mr. Brady not only faxed his expression of interest to the Secretary, Federal Communications Commission on the due date for the submission of comments, he also sent a hard copy of that expression of interest via same day delivery service and incurred a substantial expense in doing so.⁷ Moreover, until the morning of the due date, Mr. Brady was under the impression that a consulting engineer whom he had been using was taking care of filing his competing expression of interest. On that morning, Mr. Brady learned for the first time that the consulting engineer would be unable to submit his expression of interest due to a fire at the engineer's residence. Not willing to leave himself open to attack that his expression of interest was untimely (even though the NPRM did not specify the due date for the submission of expressions of interest), Mr. Brady made arrangements to have the hard copy of the expression of interest taken to Washington by the quickest means then at his disposal.

9. In *Report and Order, Julian, California*, 102 FCC 2nd 27, 28-29 (1985), the Commission stated that it would accept late filed comments where the failure to timely file was the result of an emergency or there was the existence of exceptional circumstances. As noted above, Mr. Brady's contingent Motion demonstrated that in fact a fire had prevented his consulting Engineer from submitting his Comments and as soon as he learned of the Consultant's disability (which was not until the due date for filing Comments) he took all of the steps he could to assure that

⁷ A copy of the electronic transmission is included as Attachment A.

his Comments would be received in the Secretary's office on time. In fact, the R&O acknowledges that an electronic transmission of his Comments was filed with the Commission on the due date. Moreover, since these Comments contained an expression of interest in the allocation of Channel 265C3 at Utica in accordance with Paragraph 3 of the NPRM, the information contained in the Comments were of decisional significance to this proceeding. *Julian, California, supra.* 102 FCC 2nd at 29.

10. Thus, Mr. Brady's Contingent Motion contained all of the facts necessary under the *Julian, California* ruling to require that his Comments be accepted. Therefore, this aspect of the R&O must also be reconsidered.

**The Holding That Brady's Comments
Were not Timely Filed Was Plain Error.**

11. Note 4 of the R&O, while acknowledging that Mr. Brady's Comments addressed to the Secretary, were filed via electronic transmission nearly four hours before the close of business on the due date, nevertheless holds the Comments to be untimely filed because the Commission's staff did not deliver those Comments to the Office of the Secretary until the next day.

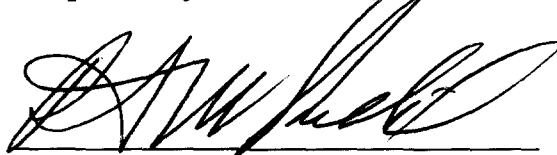
12. No explanation is given nor any citation of authority provided for this novel ruling. The Commission, since its inception, has regularly received and accepted mailed pleadings arriving on the due date as timely filed. The fact that these Comments were filed with the Commission via electronic transmission, it is submitted, is a distinction

without a difference. Further, Section 1.420(e) of the Rules states only that the required copies of all pleadings, including comments, "shall be filed with the Commission." (Emphasis added.) Nowhere is lodging such filing with the Secretary a mandate. Moreover, the failure to articulate the reasons for such disparate treatment requires that this ruling be reconsidered and reversed. *Melody Music, Inc. v. FCC*, 345 F2d 730 (1964).

Conclusion

13. The foregoing establishes: 1) that the modification of the NPRM by the R&O was *ultra vires* and hence void *ab initio*; 2) that supplemental pleadings containing information material to a decision in the case should have been considered; and 3) that Mr. Brady's Comments were in fact timely. Taken together, since Proponents failed to demonstrate the availability of an additional Class C3 FM channel at Utica, the NPRM mandates that this proceeding be terminated.

Respectfully submitted,



John M. Pelkey, Esquire
Richard M. Riehl, Esquire
Its Attorneys

HALEY, BADER & POTTS
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-1633
703/841-0606

December 5, 1994

ATTACHMENT A

**BRADY'S ELECTRONIC TRANSMISSION
FILING OF AUGUST 9, 1993**

Express Printing
14:20 08/09/93
Invoice # 057406

| | |
|----------------------|------|
| OUTGOING FAX | |
| 1 @ 1.000 plus setup | 6.00 |
| Subtotal | 6.00 |
| Tax | 0.42 |
| Total | 6.42 |
| Amount Tendered | 6.42 |
| Change | 0.00 |

THANK YOU COME SEE US AGAIN!!

Express
Printing

1440 Old Square Road
Jackson, MS 39211
Phone: (601) 366-8748
Fax: (601) 982-7177

FACSIMILE COVER SHEET

TO: Secretary, F.C.C.
ATTN: Same
FAX #: 1-202-653-5402
FROM: Donald B. Brady
OF PAGES (EXCLUDING COVER SHEET): 2
DATE: 8/9/93

IF ALL PAGES ARE NOT COMPLETELY RECEIVED, PLEASE CALL

(601) 366-8748

Thank you.

EXPRESS PRINTING

TEL:601-982-7177

Aug 09.93

13:45 No.005 P.02

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 1993

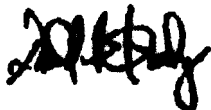
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 93-158

Dear Sir:

Please find attached a copy of my comments in the above captioned proceeding. This document has been timely filed on 8/9/93. The original copy of the material is being sent via courier.

Sincerely,



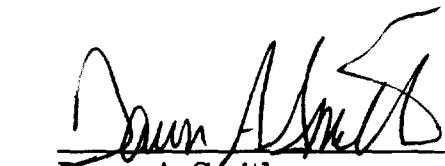
Donald B. Brady
5980 Ridgewood Road
#4-40
Jackson, Mississippi 39211
601-684-5839

No. of Copies rec'd 2
WABONE

CERTIFICATE OF SERVICE

I, Dawn A. Smith, an employee in the law offices of Haley, Bader & Potts, hereby certify that I have on this 5th day of December, 1994, sent copies of the foregoing "PETITION FOR RECONSIDERATION" by first-class United States mail, postage prepaid, to the following:

James R. Cook, Esquire
Harris, Beach & Wilcox
Suite 210
1200 Eighteenth Street, N.W.
Washington, D.C. 20036


Dawn A. Smith